Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WILLIAM HOPE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

(1)(A) Whether the 7th Circuit's determination that it had no subject matter jurisdiction - precluding defendant from appellate review of the District Court's denial of his sec. 2255 petition challenging his 30-year sentence on grounds amounting to "actual innocence" - deprives defendant of substantive and procedural due process, for it rests on unduly strict application of the Federal Rules of Civil Procedure under which defendant's notice of appeal was deemed untimely, despite compelling facts to which the "unique circumstances" doctrine [as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991)], should

apply to allow late filing of notice of appeal, here--where, the "unique circumstances" are that defendant was actively misled by the government's agreements to his two motions for extension of time to file a Rule 59 Motion, and by the District Court's granting these extensions - despite that, unknown to defense counsel at the time, the District Court had no authority to extend the time for filing a Rule 59 Motion; and, but for thus being misled, defendant could have and would have timely filed his notice of appeal;

(B) Whether the above 7th Circuit ruling conflicts with the governing principle, applied by this Court, that habeas proceedings are equitable [Hilton

v. Braunskill, 481 U.S. 770 (1987); Schlup v. Delo, 513 U.S. ___, 91 L.Ed.2d 364 (1995)], so as to avoid strict application of *res judicata* in the "successive petition" context, where defendant may be actually innocent. [McCleskey v. Zant, 499 U.S. 467 (1991); Schlup v. Delo, supra; Kuhlmann v. Wilson, 477 U.S. 436 (1986).]

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, William Hope, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the District Court, and appellee in the Court of Appeals.

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Certiorari should be allowed, because this cause is an ideal vehicle wherein this Court can determine that equitable principles peculiarly applicable in habeas proceedings must be utilized in determining whether the "unique circumstances" doctrine applies to permit a late notice of appeal.

The 7th Circuit's determination that it

review of the District Court's denial of his sec. 2255 petition challenging his 30-year sentence on grounds amounting to "actual innocence" - deprives defendant of substantive and procedural due process, for it rests on unduly strict application of the Federal Rules of Civil Procedure under which defendant's notice of appeal was deemed untimely, despite compelling facts to which the "unique circumstances" doctrine [as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991)], should apply to allow late filing of notice of appeal. Here, the "unique circumstances" are that defendant was actively misled by the government's agreements to his two motions for extension of time to file a Rule 59 Motion, and by the District Court's granting these extensions - despite that, unknown to defense counsel at the time, the District Court had no authority to extend the time for filing a Rule 59 Motion; and, but for thus being misled, defendant could have and would have timely filed his notice of appeal. The 7th Circuit's ruling conflicts with the governing principle, applied by this Court, that habeas proceedings are equitable [Hilton v. Braunskill, 481 U.S. 770 (1987); Schlup v. Delo, 513 U.S. ___, 91 L.Ed.2d 364 (1995)], so as to avoid strict application of *res judicata* in the "successive petition" context, where defendant may be actually innocent.

"successive petition" context, where defendant may be actually innocent. [McCleskey v. Zant, 499 U.S. 467 (1991); Schlup v. Delo, supra; Kuhlmann v. Wilson, 477 U.S. 436 (1986).] 17

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(1d) Judgment Below

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

WILLIAM HOPE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William Hope, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming denial of his habeas corpus petition filed pursuant to

28 U.S.C. 2255 by the United States District Court for the Northern District of Illinois, Eastern Division.

Judgment, Opinion and Orders Below

The Opinion of the Court of Appeals for the Seventh Circuit, affirming the District Court's judgment, is set out as App. A. The Opinion is reported at 43 F.3d 1140 (7 Cir. 1994). The order denying rehearing in banc, dated Feb. 15, 1995, is set out as App. B. The judgment of the District Court, dated April 27, 1993, is set out as App. C, and the order denying reconsideration on Aug. 3, 1993, is set out as App. D.

Jurisdictional Statement

On December 8, 1994, the Court of Appeals filed its Opinion (App. A) affirming the judgment of the District Court. Petition for rehearing en banc, timely filed, was denied on February 15, 1995.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> "No person shall ... be deprived of life, liberty or property, without due process of law; ..."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

In 1975, defendant, twenty-six years old, a person addicted to narcotics, was charged with burglary of an automobile dealership. His lawyer told him that there was an Illinois State statute which would permit him to be treated for his drug addiction and that he could enter into arrangements with the court so that, if he satisfactorily completed the drug addiction program, he would not have a conviction. (App. 42)[1] He was told by the trial judge that if he entered a plea under Chap. 91 1/2, Sec. 120.1 et. seq., and if he went to Gateway House and completed the period

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[1]References to App. without a letter designation are to Appellant's Appendix filed in the Court of Appeals.

of treatment at Gateway House, there would be no finding against him and the sentence of 3 to 9 years, which would be imposed only if he violated the conditions of Gateway House, would not be imposed, and there would be no conviction. (App. 31-39)

However, neither his lawyer nor the trial judge realized that because he was on parole, he could not be placed in Gateway House and treated unless, pursuant to statute (Chap. 91 1/2, Sec. 120.8), there was prior permission of the parole authorities. (App. 41) No permission was obtained. He went to Gateway House and was living up to the conditions of Gateway House when parole authorities came, seized the defendant and returned him to the

penitentiary--not upon this 1975 charge, but as a parole violator.[2]

In 1987, defendant was arrested and ultimately charged with a federal

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[2]There is no dispute that defendant was never sentenced to the 3 to 9 year sentence and no judgment of conviction was entered. In the Illinois Appellate Court, where the validity of what occurred is presently also being litigated, the State in its Statement of Facts on page 9 in the Brief filed in People v. Mason (defendant was known in the State Court as Carmelo Mason), No. 92-1459, the State asserts:

> "At the time of the above summarized proceeding, defendant was on parole for a previous burglary conviction. Defendant was subsequently arrested and sent back to the penitentiary for violation of parole on the prior burglary offense. It is clear that at no time was any further action taken as to the instant burglary conviction, and it is clear that defendant was never sentenced to the penitentiary concerning the instant burglary conviction." (Emphasis added.)

offense. At trial, he was represented by Attorney Lavon Pride. If not eligible for enhancement under 18 U.S.C. Sec. 924, the maximum sentence was 5 years. He was sentenced under 18 U.S.C. Sec. 924(e) to 30 years. At sentencing, he was represented by Attorney Lavon Pride and Attorney Greg Schlesinger. (App. 20-26) At the federal sentencing, because of other commitments and lack of preparation caused thereby, defendant's counsel did not present substantial evidence to the court on the crucial issue of whether the defendant had a conviction arising out of the 1975 occurrence. The reasons for counsel's not bringing before the court matters which, as demonstrated below, were clearly relevant, had to do with failure

to have properly prepared. He originally requested a continuance to see the State file. (App. 72) He withdrew that request, not because he had obtained the appropriate evidence, but merely because of a conflict in his schedule which mitigated his resolving the instant matter. (App. 73) He failed to demonstrate (1) that a copy of the "half-sheet" (Memorandum of Orders) did not show that a conviction was entered and did show that sentence of 3 to 9 years was withheld (App. 44-46), and hence, the action of the clerk in preparing a certification of conviction (App. 47) was in error; (2) he did not obtain a transcript of the trial court proceedings (App. 30-40) that demonstrated that no sentence to the

penitentiary and/or conviction was imposed and defendant was told none would be, if he completed treatment; (3) he did not demonstrate and raise that whatever occurred would have been procured in violation of the defendant's right to effective assistance of counsel--(State trial counsel was ineffective for not knowing that defendant was not eligible under Chap. 91 1/2, Sec. 120.8)--and not asserting that whatever occurred, occurred in violation of defendant's due process rights (it was a violation of due process to promise the defendant that there would be no conviction, where he was not eligible for such result under the applicable statutes); (4) he did not obtain a readily available affidavit

from the State Court sentencing judge that stated that at the time of disposition, defendant was advised that no conviction would be entered against him if he satisfactorily completed Gateway House. (See pp. 29-30, infra.)[3]

Counsel did not obtain and present the affidavit of defendant stating that he would not have plead if he had been told it would result in a conviction, even if he completed Gateway House successfully. (App. 42)

Counsel did not present prevailing law which would have persuaded the

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[3]At the time the affidavit was given, Judge Louis B. Garippo had retired from the bench. This document was not before the United States District Court that sentenced defendant, or the Seventh Circuit.

District Court that there was no valid conviction (see law that was available to counsel, per pp. 34-36, 40, infra.)

Not having before it such relevant facts and argument, the United States District Court found that there was a conviction, and therefore sentenced the defendant to 30 years.

Attorney Schlesinger, who had been co-counsel at the sentencing hearing, (App. 25), proceeded with the appeal. Although he raised the issue that counsel was ineffective at trial, he did not argue the ineffectiveness of counsel in the District Court relative to the matters heretofore set out demonstrating all the things that counsel failed to do with respect to sentencing. He did not

and could not, because to do so,[4] of course, would have been to raise his own ineffectiveness.

The Court of Appeals specifically pointed out that the constitutional challenge raised by counsel below was deficient, due to the absence of both a legal and a factual basis. United States v. Hope, supra, 906 F.2d at 263.

Thereafter, defendant filed a Sec. 2255 Petition in the District Court. That Petition set out (1) that counsel, both (a) in the United States District Court at the sentencing hearing and (b) on direct appeal, rendered ineffective assistance of counsel, and (2) that the State Court proceeding in 1975 (a) was

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[4]His argument was de minimus.

invalid and (b) did not result in a constitutionally valid conviction. The District Court denied that Petition (App. C)

Chronology and Procedural History

The original order denying habeas corpus was entered April 27, 1993.

On May 4, 1993--within the 10-day time limitation for filing a Rule 59 motion as to the order of April 27, 1993 denying the Sec. 2255 petition--Hope filed his "AGREED MOTION TO EXTEND TIME UNTIL MAY 24, 1993 TO FILE MOTION FOR RECONSIDERATION OF ORDER OF APRIL 27, 1993." (App. II, 53-55) The Motion is verified via Affidavit of undersigned counsel. (App. II, 55) Paragraph 1 of the said "Agreed Motion," over counsel's affidavit, avers:

> "1. Scott Collins, Assistant United States Attorney, has no objection to the grant of this motion." (App. II, 54, par. 1)

The District Court granted the said "Agreed Motion" the following day, May 5, 1993, extending the time until May 24, 1993. (App. II, 56)

On May 21, 1993, within the time as thus extended, Hope filed his "AGREED MOTION TO EXTEND TIME UNTIL JUNE 14, 1993 TO FILE MOTION FOR RECONSIDERATION OF ORDER OF APRIL 27, 1993." (App. II, 57-59) Again, par. 1, over undersigned counsel's affidavit, (App. II, 60), avers that AUSA Scott Collins "has no objection to the grant of this motion." (App. II, 58, par. 1)

Defendant's Motion for Reconsideration (with supporting

Memorandum and attachments) was filed on June 14, 1993 (R. 114), within the time as extended by the court's orders (R. 111, 113) allowing each of defendant's two aforesaid **agreed** timely-filed motions for extension. (R. 110, 112) This motion for reconsideration was denied. (App. D)

The Court of Appeals, holding it had no subject matter jurisdiction as to the original denial of the habeas corpus, entered on April 27, 1993, affirmed. (App. A)

REASONS FOR GRANTING CERTIORARI

1.

Certiorari should be allowed, because this cause is an ideal vehicle wherein this Court can determine that equitable principles peculiarly applicable in habeas proceedings must be utilized in determining whether the "unique circumstances" doctrine applies to permit a late notice of appeal.

The 7th Circuit's determination that it had no subject matter jurisdiction - precluding defendant from appellate review of the District Court's denial of his sec. 2255 petition challenging his 30-year sentence on grounds amounting to "actual innocence" - deprives defendant of substantive and procedural due process, for it rests on unduly strict application of the Federal Rules of Civil Procedure under which defendant's notice of appeal was deemed untimely, despite compelling facts to which the "unique circumstances" doctrine [as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991)], should apply to allow late filing of notice of appeal. Here, the "unique circumstances" are that defendant was actively misled by the government's agreements to his two motions for extension of time to file a Rule 59

Motion, and by the District Court's granting these extensions - despite that, unknown to defense counsel at the time, the District Court had no authority to extend the time for filing a Rule 59 Motion; and, but for thus being misled, defendant could have and would have timely filed his notice of appeal. The 7th Circuit's ruling conflicts with the governing principle, applied by this Court, that habeas proceedings are equitable [Hilton v. Braunskill, 481 U.S. 770 (1987); Schlup v. Delo, 513 U.S. ___, 91 L.Ed.2d 364 (1995)], so as to avoid strict application of *res judicata* in the "successive petition" context, where defendant may be actually innocent. [McCleskey v. Zant, 499 U.S. 467 (1991); Schlup v. Delo, supra; Kuhlmann v. Wilson, 477 U.S. 436 (1986).]

The Seventh Circuit held that defendant was barred from appealing from the District Court's denial of habeas corpus pursuant to 28 U.S.C. Sec. 2255, because notice of appeal was filed late. The Court of Appeals held that the "unique circumstances" doctrine was inapplicable, even though the notice was

not timely filed because of counsel's reliance upon actions of the District Court in extending time to file post-judgment motions.

This ruling is contrary to due process and to this Court's opinions concerning the application of equitable principles to habeas corpus proceedings. McCleskey v. Zant, 499 U.S. 467, 113 L.Ed.2d 517 (1991); Hilton v. Braunskill, 481 U.S. 770, 95 L.Ed.2d 724 (1987); Schlup v. Delo, 513 U.S. ___, 130 L.Ed.2d 808 (1995); Kuhlmann v. Wilson, 477 U.S. 436, 91 L.Ed.2d 364 (1986).

The chronology and procedural history is set out at pp. 14-16, supra.

Under these unique circumstances, defendant's case comes within the

"unique circumstances" doctrine as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991), and is subject to the equitable principles applicable to habeas corpus proceedings. The original order denying the petition was entered on April 27, 1993, and defendant's **agreed** motion for extension was filed May 5, 1993 and granted on May 6, 1993; there was ample time for defendant to file a motion for new trial, if the government had not agreed, and/or if the court had not granted the request. The second motion for extension was filed within ample time--May 21--and again, the government **agreed** thereto. And again, on May 26, 1993, the court granted the **agreed** motion. If

the government had then raised the issue here raised, or if the court had not asserted by its action in granting the motion, that it had the right to grant the motion both on May 6, 1993 and May 26, 1993, it was **still within thirty days** since April 27, and defendant could have **then** filed his timely notice of appeal. Because the government was involved, F.R.App.P. 4(a), he had 60 days to file the notice of appeal. The motion for reconsideration was filed on June 16, 1993, within that 60 days. Hence, **if not for counsel being lulled by judicial and government action, the notice of appeal would have been timely filed**.

Tested by habeas corpus equitable principles, a late notice of appeal

should be permitted, because (a) counsel relied on the government and the court, (b) there is cause and prejudice, and (c) there is evidence of defendant's actual innocence. McCleskey v. Zant, 499 U.S. 467, 113 L.Ed.2d 517 (1991).

Although habeas corpus proceedings are tentatively regulated by civil procedure, courts must be guided by the unique nature of habeas corpus proceedings in light of the history and purpose of habeas practice. Hilton v. Braunskil, 481 U.S. 770, 95 L.Ed.2d 724 (1987). Cf. McCleskey v. Zant, supra, Schlup v. Delo, 513 U.S. ___, 130 L.Ed.2d 808 (1995), and Kuhlmann v. Wilson, 477 U.S. 436, 91 L.Ed.2d 364 (1986). In Schlup v. Delo, supra, this Court stated:

> "At the same time, the Court has adhered to the principle that **habeas corpus is, at its core, an equitable remedy**. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata." 130 L.Ed.2d at 831. (Emphasis added.)

See Karstetter v. Cardwell, 399 F.Supp. 1298 (S.D.N.Y. 1975) (late filing of notice of appeal allowed on finding of "excusable neglect"). There, a State prisoner's time for filing Notice of Appeal from denial of habeas corpus had elapsed due to counsel's erroneous calculation; he asserted the bulk of his practice involved cases wherein the United States is a party, and therefore calendared the case as one with a 60-day period for filing notice of appeal, rather than the actually applicable 30-day period. The Court

concluded that for purposes of filing a tardy notice of appeal, although a petition for writ of habeas corpus is a civil, as opposed to a criminal, proceeding, the standard of "excusability" utilized in criminal, rather than in civil cases must apply, because "a man's liberty is at stake" in habeas proceedings. Accord, Inglese v. Warden, 687 F.2d 362 (11 Cir. 1982).

Here, where the notice of appeal was filed late due to ineffective assistance of counsel and/or excusable neglect, because counsel was nct aware of application of F.R.C.P., Rules 59 and 60 and impermissibly relied upon the acquiescence of both the government and the court, and there is cause and prejudice, a late notice of appeal

should have been permitted.

There is cause, because when a lawyer fails to file a notice of appeal where both defendant and his lawyer intend to file the notice of appeal, but counsel does not do so, that rises to the level of ineffective assistance of counsel amounting to "cause." Rodriquez v. United States, 395 U.S. 327, 23 L.Ed.2d 340 (1969). There: "[P]etitioner's counsel did not submit a notice of appeal within the 10-day period specified" by the then-applicable Rule.[5] This Court held it was not necessary to meet the heaviest standard and prove violation of defendant's

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[5]F.R.Cr.P. 37(a), which had been superseded by F.R.App.P. 4(b). Id. at 328 n.1, 23 L.Ed.2d at 343 n.1.

constitutional rights through a Sec. 2255 Petition; instead, because the notice was not timely filed due to ineffective assistance, this Court remanded for appointment of counsel and to permit defendant to proceed with a direct appeal. Accord, Bell v. Lockhart, 795 F.2d 655 (8 Cir. 1986); Lozada v. Deeds, 498 U.S. 430, 112 L.Ed.2d 956 (1991); Shockey v. Illinois, 375 U.S. 22, 11 L.Ed.2d 43 (1963); Hollis v. United States, 687 F.2d 257 (8 Cir. 1982); Mack v. Smith, 659 F.2d 23 (8 Cir. 1981).

There is prejudice, because but for counsel's error, defendant would have had a right to appeal, and the reviewing court would be compelled to find defendant is innocent, for he has no

1975 Illinois conviction.

Defendant has been sentenced to 30 years **only** because the government asserted that defendant had a 1975 State conviction, where there was no such conviction; where the 1975 State proceeding itself violated defendant's constitutional rights; and where counsel in the federal trial and appellate courts failed to demonstrate the illegality of the 1975 proceeding, and their failure to do so itself was ineffective assistance of counsel.

THERE IS NO CONVICTION IN 1975 AND SURELY NOT A VALID CONVICTION BECAUSE DEFENDANT AGREED TO PLEAD WITH THE PROMISE THERE WOULD BE NO CONVICTION IF HE DID NOT VIOLATE CERTAIN CONDITIONS OF DRUG TREATMENT, WHICH HE DID NOT

VIOLATE; AND HENCE FINDING A CONVICTION WOULD VIOLATE DUE PROCESS.

ADDITIONALLY, HE PLED AFTER HIS LAWYER FAILED TO DETERMINE THAT HE WAS NOT ELIGIBLE FOR A DRUG TREATMENT PROGRAM, AND HENCE, HE WAS INDUCED TO PLEAD BY INEFFECTIVE ASSISTANCE OF COUNSEL.

On November 21, 1975, defendant, represented by an Assistant Public Defender (App. II, 30-40), entered a plea, having been induced to enter that plea by his counsel's advice to the defendant: (a) that he was eligible for treatment pursuant to Chap. 91 1/2, Sec. 120.1 etc. (when he was not); (b) that the court would place the defendant in Gateway House pursuant to said Chapter; and (c) that if defendant completed the treatment, no conviction or sentence

would be entered against him, i.e., it would be as if he were acquitted. The State judge confirmed this would occur when he told defendant:

> "I would withhold the finding and the judgment...." (App. II, 32)

The State trial judge (now retired) has provided an Affidavit; it was his understanding of the plea agreement that if defendant complied with the conditions of Gateway House, there would be neither a sentence nor a conviction:

> "3. There was a plea agreement ... with the understanding that defendant was to go to Gateway House, and that if he did not intentionally violate the conditions of Gateway House, no conviction would be entered against him ... [and] that if he did violate the conditions, he would be brought back to court and then a conviction would be

> entered and he would be sentenced to a period of three to nine years. By withholding judgment no sentence ever was imposed." (Emphasis added.) (See App. II, 18.)

Defendant has asserted in an uncontested affidavit that he would not have entered the plea if he had not been told--and believed--that he could avoid a conviction by entering a technical plea of guilty, entering Gateway House and abiding by the conditions of the drug treatment program. He would not have entered his plea if he had been told he was not eligible under Chap. 91 1/2, Sec. 120.8, without the parole officer's prior agreement, and that they did not agree. (App. II, 42)

The promise made to defendant by his counsel and the court--that if he

completed the program, there would be no conviction--was incorrect and false, because he was not eligible unless the parole authorities agreed, and they did not agree.[6] Thus, the plea violated due process because it was induced by a false promise, and was therefore not knowingly and intelligently made.

The situation is analogous to where the court and counsel advise defendant he is eligible for parole and defendant pleads guilty, but under the law, defendant is not eligible. Such plea is obtained in violation of due process,

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[6]Defendant never violated his obligations under the agreement with the court, because he never voluntarily left Gateway House, and instead administratively was sent from Gateway House to the penitentiary as a parole violator.

Gates v. United States, 515 F.2d 73 (7 Cir. 1975), and in violation of defendant's right to effective assistance of counsel. Garmon v. Lockhart, 938 F.2d 120 (8 Cir. 1991); United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990). Here, defendant was expressly told by the trial court there would not be any conviction and sentence; that judgment was being withheld (App. II, 32, 38) if he complied with the conditions of Gateway. Such misapprehension by the defendant as to the consequences of the plea, renders the plea, and any subsequent conviction, constitutionally invalid. People v. Caravello, 2 Ill.App.3d 995, 278 N.E.2d 447 (1 Dist. 1971); People v. Nolte, 167 Ill.App.3d 915, 522 N.E.2d 283 (3 Dist.

1988), appeal denied, 122 Ill. 588, 530 N.E.2d 258; United States ex rel. Miller v. McGinnis, 774 F.2d 819 (7 Cir. 1985).

Due process was also denied because he was taken as a parole violator although he did not violate the conditions of Gateway. Having satisfied his part of the bargain, due process was violated because the State did not comply with its part of the bargain.

In any event, there was no valid conviction, because counsel's representation was defective. Counsel failed even to read the statute that in simple words [plain English] rendered defendant ineligible for the drug treatment alternative: "that a person is eligible, [unless] ... (e) the addict is on probation or parole and the

appropriate parole or probation authority does not consent to that election." 91 1/2, Sec. 120.8(e) (App. II, 41) Hence, he provided ineffective assistance, which renders the alleged conviction constitutionally invalid. Brewer v. Aiken, 935 F.2d 850 (7 Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11 Cir. 1991); Cave v. Singletary, 971 F.2d 1513 (11 Cir. 1992); Prichard v. Lockhart, 990 F.2d 352 (8 Cir. 1993); Blackburn v. Foltz, 828 F.2d 1177 (6 Cir. 1987); Iaea v. Sunn, 800 F.2d 861 (9 Cir. 1986). The 1975 alleged conviction or plea therefore violates due process. United States ex rel. Miller v. McGinnis, supra.

It was appropriate for the District Court to review a matter partially considered on direct

appeal, where defendant, at his federal appeal and trial, had ineffective assistance of counsel.

The Seventh Circuit Court of Appeals did not have before it, due to ineffective assistance, relevant facts and law when it decided defendant's original appeal, United States v. Hope, 906 F.2d 254 (7 Cir. 1990).

Because on the date of the federal sentencing hearing, Mr. Schlesinger, who later served as appellate counsel, was co-counsel with trial counsel (App. II, 25), there can be no waiver of appellate counsel's failure to raise on direct appeal, the issue of ineffectiveness of trial counsel. This fact amounts to "cause" for not raising the issue of ineffective trial counsel on direct appeal. Therefore, the issue of

ineffectiveness of trial counsel can and should be reviewed via habeas corpus proceedings. See United States v. Castillo, 965 F.2d 238 (7 Cir. 1992); United States v. Derewal, 10 F.3d 100 (3 Cir. 1993). Failure of appellate counsel to effectively raise the issue of ineffectiveness of trial counsel satisfies the "cause and prejudice" test. United States ex rel. Barnard v. Lane, 819 F.2d 798 (7 Cir. 1987); Freeman v. Lane, 962 F.2d 1252 (7 Cir. 1992); Rosenwald v. United States, 898 F.2d 585 (7 Cir. 1990).

Defendant was denied effective assistance of appellate counsel in the federal court.

Although appellate counsel in United States v. Hope, supra, asserted the defect of the performance of trial

counsel (Appellant's Brief in United States v. Hope, No. 88-3134, pp. 39-41, App. II, 27-29), the position was presented in a most deficient manner. Counsel cited no cases. He failed to demonstrate that what the Court of Appeals held to be a failure of Hope to prove he was denied his rights in the State Court, was not due to absence of evidence or law, United States v. Hope, supra, at 263, but instead, was due to failure of counsel to present the evidence and law.

The appellate counsel, who was suffering under a demonstrable, facial conflict difficulty, never asserted, among other issues, that trial counsel rendered ineffective assistance in the District Court because he failed to

raise the issue that State trial counsel rendered ineffective assistance in the 1975 State proceeding. He also failed to present relevant controlling law that demonstrated there was no State conviction or sentence. People v. Teschner, 81 Ill.2d 187, 407 N.E.2d 49, 51 (1980); People v. Thomas, 204 Ill.App.3d 890, 562 N.E.2d 396, 398 (4 Dist. 1990); People v. Williams, 195 Ill.App.3d 433, 552 N.E.2d 389, 391 (4 Dist. 1990); People v. Tucker, 183 Ill.App.3d 333, 539 N.E.2d 243, 245 (2 Dist. 1989).

In the District Court, defendant was denied effective assistance of counsel.

Although counsel in the District Court originally objected to the admissibility of defendant's 1975

"conviction" and attempted a constitutional attack, his efforts were meager, to say the least:

> "The constitutional challenges which Hope raised at the trial level, however, were **conclusory in nature and lacked both a factual and legal basis.** Hope **presented no evidence** whatsoever to suggest that his plea of guilty in 1975 was not knowingly and voluntarily made, that his attorney at the time rendered constitutionally ineffective assistance, or that he was otherwise denied 'due process'." Hope, supra, at 263. (Emphasis added.)

This is, of course, precisely what was done in the habeas corpus proceedings.

Surely, counsel was ineffective, because sitting there, like a pear ready to be plucked, were facts demonstrating that the plea was induced by false promises and misleading advice of

counsel; and hence, defendant was denied due process and effective assistance of counsel. The evidence not presented was: transcript of the 1975 Illinois proceeding showing that defendant was told by the State trial judge that there would be no conviction (App. II, 30-40); affidavit of trial judge; law showing that the advice of counsel was ineffective assistance because it told defendant he was eligible, when he was not; evidence from the Illinois Department of Corrections showing that they never considered they received the defendant as a person convicted for the 1975 burglary (App. II, 43); Chicago Police Department "rap sheet" showing defendant was sentenced to 2 years drug abuse program, not sentenced to 3 to 9

years (App. II, 50); the affidavit of defendant asserting the misadvice that he received, and that he would have not proceeded to plead, but would have gone to trial, if he had known that he was ineligible for the drug program and that his actions would result in a conviction even though he complied with the conditions of Gateway House. (App. II, 42) Also not presented to the District Court was controlling law, as herein presented, demonstrating that upon those facts, the 1975 "plea" was constitutionally invalid.

Here, federal sentencing counsel's failure properly to prepare and investigate was due to preoccupation with preparation for the trial of some other defendant. He recognized he was

not prepared, and therefore requested a continuance to obtain the relevant State file. (App. II, 72) He then withdrew his request because of his need to commence a different trial. (App. II, 73)

Here, defendant's federal trial counsel totally failed to conduct the necessary investigation which would have demonstrated that there was no "conviction" rendering defendant eligible for an enhanced sentence. Failure to properly prepare for sentencing, or to properly object to or cause to be excluded evidence that was used to enhance defendant's sentence, is ineffective assistance of counsel. Brewer v. Aiken, 935 F.2d 850 (7 Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11

Cir. 1991); Cave v. Singletary, 971 F.2d 1513 (11 Cir. 1992) (failure to prepare); Prichard v. Lockhart, 990 F.2d 352 (8 Cir. 1993) (failure to object and prevent use of out-of-state conviction for enhancement).

IN SUMMARY

Applying the equitable principles applicable to habeas corpus proceedings, under the unique circumstances doctrine, a late notice of appeal should have been permitted because here, the present result is to permit the lengthy incarceration of a person who is innocent of having a prior conviction.[7]

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[7]One last time: The enhanced sentence, 30 years, is 6 times greater than the greatest sentence defendant could have received on the firearm charge, if the 1975 State proceeding had not been counted as a conviction.

There was no constitutionally valid 1975 conviction or sentence. Hence, the 30 year federal enhanced sentence is illegal and unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDIX A

App. 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-3207

WILLIAM HOPE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 92 C 6654 & 88 CR 298—George M. Marovich, *Judge.*

ARGUED SEPTEMBER 8, 1994—DECIDED DECEMBER 23, 1994

Before WELLFORD,* MANION, and KANNE,
Circuit Judges.

KANNE, *Circuit Judge.* A federal district court jury convicted William Hope of unlawfully possessing a firearm as a convicted felon. The district judge sentenced Hope to thirty years imprisonment after finding that he had three prior violent felony convictions; we upheld Hope's conviction and sentence on direct appeal. *United States v. Hope*, 906 F.2d 254 (7th Cir. 1990), *cert. denied*, 499 U.S. 983, 111 S.Ct. 1640 (1991).

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* The Honorable Harry W. Wellford of the Sixth Circuit, sitting by designation.

Hope then attacked his sentence collaterally by way of a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. He alleged in his motion that his attorneys at various stages of his criminal justice experiences have been constitutionally ineffective. The district court denied his motion on April 27, 1993. On May 4 and May 21, 1993, Hope filed motions to extend the time to file a "Motion For Reconsideration" with the district court. The government did not object to either motion and the district court granted both through minute orders. On June 14, 1993, Hope filed a Motion For Reconsideration with the district court, seeking review of its denial of his § 2255 petition. The district court denied Hope's Motion For Reconsideration on August 3, 1993. Ten days later, on August 13, 1993, Hope filed his notice of appeal from the district court's dismissal of his § 2255 petition and the district court's denial of his Motion For Reconsideration.

The district court clerk did not complete Form AO 450, entitled JUDGMENT IN A CIVIL CASE, as is the usual and prudent practice when disposing of civil claims, such as § 2255 petitions. However, the clerk completed a minute order form that is self-contained and complete, sets forth the relief to which the prevailing party is entitled, does not incorporate another document or other legal reasoning, and otherwise unambiguously communicates the district court's final disposition of the proceedings. This is what Rule 58 requires. *American Nat'l Bank & Trust v. Secretary of HUD*, 946 F.2d 1286, 1289 (7th Cir. 1991). The minute order box "[Other docket entry]" is checked, but this fact does not destroy the judgment's finality.[1]

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[1] As an aside we note that one reason for the Rule 58 requirement of a separate document "is to ensure that the parties and the appellate court can be certain about the proper timing of the appeal." *Smith v. Village of Maywood*, 970 F.2d 397, 400 (7th Cir. 1992). As will be seen, Hope overran the time for filing a notice of appeal from the district court's denial of his § 2255 petition, but there is no indication that the district court's use of an AO 450 form would have caused him to file a timely notice. In fact, Hope did not raise the Rule 58 separate document issue in his brief or argument.

We will accept the minute order form as the required separate document in this case, but we remind the clerks of the district courts that Form AO 450 is the preferred and sound vehicle for complying with Rule 58. Thus, the district court's dismissal of Hope's § 2255 petition became final and appealable on April 27, 1993.

Our jurisdiction to review the district court's dismissal of Hope's petition fails, however, because Hope did not file his notice of appeal within the time required by FEDERAL RULE OF APPELLATE PROCEDURE ("FED. R. APP. P.") 4. In a civil case against the United States, a party has sixty days to file its timely notice of appeal. FED. R. APP. P. 4(a)(1). A petition brought pursuant to 28 U.S.C. § 2255 by a federal prisoner constitutes a civil suit subject to this rule. FED. R. ON MOTION ATTACKING SENTENCE UNDER 28 U.S.C. § 2255 No. 11. Timely notice of appeal is mandatory and jurisdictional, meaning that "if an appellant does not file his notice of appeal on time, we cannot hear his appeal." *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1561 (7th Cir. 1990) (en banc). The district court entered its minute order signifying final judgment on April 27, 1993; William Hope filed his notice of appeal on August 13, 1993, more than 30 days after it was due.

Various post-judgment motions to the district court toll the time for filing a timely notice of appeal. FED. R. APP. P. 4(a)(4). Two such motions are motions to alter or amend the judgment under FED. R. CIV. P. 59, which must be filed within 10 days of the entry of judgment, and relief under FED. R. CIV. P. 60, if served within 10 days after the entry of judgment. FED. R. APP. P. 4(a)(4)(C) & (E). Hope apparently wished to move, under Rule 59(e), the district court to alter or amend its dismissal of his claim.[2] However, Hope did not file his mo-

[2] Hope styled his motion as a "Motion For Reconsideration," a motion that, strictly speaking, does not exist under the Federal Rules of Civil Procedure.

tion within 10 days of the district court's judgment. Instead, he filed motions on May 4 and May 21 to extend the time in which to file his generic Motion For Reconsideration. The district court granted both motions to extend time by issuing minute orders to that effect. Hope finally filed his Motion For Reconsideration on June 14, thirteen days before his notice of appeal was due.

Two principles of appellate practice are applicable to these facts. First, the district court may not extend the time within which a party may move to alter or amend a judgment under Rule 59(e). FED. R. CIV. P. 6(b), 59(e); *Bailey v. Sharp*, 782 F.2d 1366 (7th Cir. 1986). Second, a motion to alter or amend a judgment under Rule 59(e) that is filed more than 10 days after entry of judgment automatically becomes a Rule 60(b) motion. *United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992). So, while Hope did not file a proper motion to alter or amend a judgment under Rule 59(e), he did file a proper motion under Rule 60(b). The district court had jurisdiction to hear his Motion For Reconsideration on this basis, but Hope's motion did not toll the time for filing a notice of appeal. Appellate Rule 4(a)(4) specifically states that a Rule 60(b) motion will not toll the time for filing notice of appeal unless it is filed within 10 days of judgment. FED. R. APP. P. 4(a)(4)(f). Therefore, because the time was not tolled, Hope's notice of appeal was late.

Hope argues that, by granting his motions to extend the time in which to file his Motion For Reconsideration, the district court led him to believe that his substantive motion tolled the time for filing his notice of appeal. This argument invokes the doctrine of "unique circumstances."

The doctrine of unique circumstances relieves a party from the consequences of filing a late notice of appeal where the district court has affirmatively assured the party that his motion has tolled the time for filing a notice of appeal. *Thompson v. Immigr. & Naturalization Serv.*, 375 U.S. 384, 387, 84 S.Ct. 397, 399 (1964). *Thompson* held that where a petitioner performed an act which, if

properly done, would have postponed the deadline for filing his appeal, and the district court concluded erroneously that the act had been properly done, the party may proceed as though the time for appeal has been postponed. *Id.* However, this is a narrow doctrine. The Supreme Court has interpreted *Thompson* to require a "specific assurance by a judicial officer" that the necessary act has been properly done. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179, 109 S.Ct. 987, 993 (1989). And we have interpreted *Osterneck* to require something more affirmative than a minute order granting a party's motion for extending the time to file a Rule 59 motion for unique circumstances to exist. *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989).

The district court did nothing more than enter minute orders granting Hope's motions for extending the time in which to file his Motion For Reconsideration. Furthermore, Hope did not style his motions as calling for relief under Rule 59(e). In his motions to extend the time in which to file his substantive post-judgment motion, Hope referred to the forthcoming motion as a "Motion For Reconsideration." The district court judge may have assumed that Hope intended to move for relief under Rule 60(b) because Hope planned not to file his motion until after Rule 59(e)'s ten day limit. We will not allow Hope's ambiguity to extract from the district court an improper extension of time under the guise of unique circumstances. Therefore, we hold, consistent with *Green*, that the district court's minute orders granting Hope's pleas for extensions of time did not constitute the sort of specific assurances that might trigger the unique circumstances doctrine. These orders did not assure Hope that his time for appeal was tolled. They merely acknowledged that the court would consider Hope's Motion For Reconsideration in some vein even if Hope wanted to file it more than ten days after the court's judgment. Notably, the district court ultimately treated Hope's Motion For Reconsideration as a Rule 60(b) motion, indicating the court understood that the motion could not be treated as a Rule 59(e) motion. It is not the district court's duty, nor the U.S. Attorney's

duty,[3] to sort through post-judgment motions and advise the moving party whether his appeal clock remains ticking. So long as the district court granted Hope no specific assurance that his motion tolled the appeal clock, no unique circumstances existed and the appeal clock remained running.

We lack subject matter jurisdiction over the district court's dismissal, but we may review the district court's denial of Hope's Motion For Reconsideration. *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994). We review the district court's judgment for abuse of discretion; such abuse exists "only in situations in which no reasonable person could agree with the district court." *Id.* (citations omitted).

The case that authorizes district courts to review late Rule 59(e) motions as Rule 60(b) motions elucidates that "substantive motions . . . must be shaped to the specific grounds for modification or reversal found in 60(b)—they cannot be general pleas for relief." *Deutsch*, 981 F.2d 299, 301 (citations omitted). Hope's Motion For Reconsideration was not shaped accordingly. He invoked his original § 2255 claims of constitutionally ineffective counsel, adding the twist that his counsel on direct appeal had a conflict of interest. He did not aver a cognizable ground for relief under Rule 60(b). In denying Hope's motion, the district court noted that Rule 9(b) of the Rules Governing § 2255 Proceedings allows dismissal of a successive motion that alleges no new or different grounds or alleges new grounds that the movant could have raised earlier. And Rule 60(b)(2) requires newly discovered evidence to reopen a judgment. The district judge quite reasonably concluded that Hope's Motion For Reconsideration offered nothing new. Hope alleged a new angle in his Motion For Reconsideration (his appeal lawyer's conflict of interest), but he could have raised this issue earlier. He did not present newly discov-

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[3] Hope also tries to obviate the consequences of his attorney's mistaken understanding of the law by blaming the government for not objecting to his motions to extend time.

ered evidence, and we find no other reason that would justify reopening Hope's sentence for further review. The district court did not abuse its discretion in denying Hope's Motion For Reconsideration in this matter. We AFFIRM.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

App. 8

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 15, 1995

Before

Hon. Harry W. Wellford, Circuit Judge*
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

WILLIAM HOPE,	) Appeal from the
	) United States
Petitioner-Appellant,	) District Court
	) for the Northern
No. 93-3207	) District of
	) Illinois, Eastern
vs.	) Division.
	)
UNITED STATES OF AMERICA,	) Nos. 92 C 6654
	) and 88 CR 298
	)
Respondent-Appellee.	) George M. Marovich, Judge.

O R D E R

On consideration of the petition

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* The Honorable Harry W. Wellford of the Sixth Circuit, sitting by designation.

for rehearing with suggestion for rehearing in banc filed in the above-captioned case, no judge in active service has requested a vote, and all of the judges on the original panel have voted to deny a rehearing.

IT IS HEREBY ORDERED that the petition for rehearing is hereby DENIED.

APPENDIX C

App. 10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA

V.

WILLIAM HOPE

Case Number: 92 C 6654 (88 CR 298)

o Jury verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

● Decision by Court. This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendant's motion under 28 USC 2255 to vacate, set aside, or correct sentence is denied.

April 27, 1993 — *Date*

H. Stuart Cunningham — *Clerk*

[handwritten] Frances D'Andrea
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

92 C 6654

V.

Judge George M. Marovich

WILLIAM HOPE, No. 97710-024

Defendant.

MEMORANDUM OPINION AND ORDER

William Hope ("Hope") brought this action under 28 U.S.C. §2255 to vacate, set aside, or correct the sentence imposed by the United States District Court for the Northern District of Illinois, Eastern Division, on October 27, 1988, for unlawful possession of a firearm in violation of 18 U.S.C. §922 (g)(1). The United States of America

("Government") opposes Hope's petition and requests that it be dismissed without an evidentiary hearing. Hope maintains that he was denied effective assistance of counsel in the federal trial for firearms violations, in a state proceeding that resulted in a conviction used to enhance his federal sentence, and in the appeal of his federal conviction. Hope also alleges a denial of his due process rights during the state proceeding. For the reasons set forth below, we deny Hope's request for post-conviction relief. *[p. 2]*

FACTUAL BACKGROUND

On June 27, 1988, Hope was indicted for unlawful possession of a firearm that had previously traveled in interstate commerce, in violation of 18

U.S.C. §922(g)(1). Following a jury trial, Hope was convicted of that offense, and the government sought sentence enhancement under 18 U.S.C. §924(e) because Hope had three prior felony convictions. The district court denied Hope's Motion to Prevent the Government from Using Alleged Convictions to Enhance Sentencing. The court specifically found that Hope had been convicted of three prior felonies, and therefore the district court sentenced Hope to thirty years without parole.

Hope appealed his conviction on four grounds: (1) that police lacked probable cause to arrest him for the firearms violation; (2) the district court improperly admitted a stipulation

showing that he had previously been convicted of deviate sexual assault without a limiting instruction; (3) the evidence at trial was insufficient for a rational trier of fact to find him guilty beyond a reasonable doubt; and (4) he did not receive effective assistance of counsel at trial and during the sentencing hearing. The Seventh Circuit upheld Hope's conviction. United States v. Hope, 906 F.2d 254, 257-60 (7th Cir. 1990).

The Seventh Circuit also considered Hope's three challenges to the sentence enhancement. Id. at 260. Hope contended that: (1) one of the three felonies, a 1975 burglary of a commercial building, never resulted in a conviction; (2) commercial burglary should not be a

sentence-enhancing offense under 18 U.S.C. §924(e); *[p. 3]* and (3) the district court's failure to determine whether 1975 state proceedings actually resulted in a conviction contravened due process of law. Id. The Court of Appeals considered and rejected each of these challenges to the sentence enhancement. Id. at 260-63.

Hope brings the present action, asking this court to vacate, set aside, or correct the sentence imposed by the district court. Hope raises three principal arguments before this court: (1) his sentence was enhanced based upon a 1975 commercial burglary conviction that was obtained in violation of his rights to effective assistance of counsel and due process of law; (2) he

was denied effective assistance of trial counsel during proceedings in the district court; and (3) he was denied effective assistance of appellate counsel during proceedings before the Seventh Circuit.

DISCUSSION

A federal prisoner may obtain relief under 28 U.S.C. §2255 if his confinement is in violation of the Constitution or laws of the United States. Davis v. United States, 417 U.S. 333, 342-43 (1974). Section 2255 was intended to afford federal prisoners a remedy identical in scope to that available to state prisoners under 28 U.S.C. §2254. Id. at 343-44.

Hope first contends that his sentence was enhanced based upon an

invalid 1975 conviction in the Illinois Circuit Court for commercial burglary. Hope maintains that the 1975 conviction was invalid because it was obtained through violations of his rights to effective assistance of counsel and due process of law and that the *[p. 4]* plea he entered during that proceeding was involuntary and unknowing.

The issues contained in Hope's first principal argument were raised in Hope's Motion to Prevent Government from Using Alleged Prior Convictions To Enhance Sentencing which was presented to the district court prior to sentencing. The Seventh Circuit affirmed the district court's denial of Hope's motion, as well as, the use of the 1975 state conviction as a predicate

for sentence enhancement. Hope, 906 F.2d at 263. The Seventh Circuit specifically noted that in the district court Hope presented no evidence suggesting that he received ineffective assistance of counsel, that his 1975 plea was not knowing and voluntary, or that he was denied due process during the course of the 1975 proceeding. Id. Thus, the Seventh Circuit has decided the issues in Hope's first contention against him.

In considering a §2255 petition, a district court may not entertain issues decided adversely to the petitioner on direct appeal of his conviction unless the petitioner brings forward new facts or supports his assertions with an intervening change in the law. Page v.

United States, 884 F.2d 300, 302 (7th Cir. 1989); Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982). Hope's contentions here, alleging ineffective assistance of counsel, an unknowing and involuntary guilty plea, and denial of due process in connection with his 1975 conviction, were addressed by both the district court and the Court of Appeals. Since there has been no *[p. 5]* change in the law in this area, the petitioner must present new facts or evidence in order to prevail on his first argument.

Hope contends that his 1975 plea was not made knowingly and voluntarily and therefore in violation of his constitutional rights. In support of these contentions, Hope has attached four pieces of evidence to his §2255

petition: (1) a copy of the transcript of the 1975 proceedings that resulted in his state court conviction; (2) an affidavit of the Honorable Louis B. Garippo, presiding Judge during the 1975 proceedings in the Cook County Circuit Court; (3) Hope's own affidavit, stating that his attorney did not inform him of a critical detail[1] in the 1975 plea bargain; and (4) a letter from the Chief Records Officer of the Illinois Department of Corrections to Hope's current counsel. The letter indicates

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[1]Hope alleges that his counsel did not inform him that the entire agreement under which he was to undergo drug treatment at a facility called Gateway House in lieu of a three to nine year sentence, was subject to the approval of his parole officer. According to the record now before us, Hope's parole officer did not give his consent to the agreement, and Hope was returned to state custody to serve the suspended sentence imposed by Judge Garippo.

that the Illinois Department of Corrections has no record of Hope's 1975 conviction beyond his guilty plea and sentence to a drug abuse program.

However, for this court to consider new facts or evidence brought forth by the petitioner, the petitioner must first satisfy the cause-and-prejudice standard set forth in Keeney v. Tomayo-Reyes, 112 S. Ct. 1715, 1719 (1992). In Keeney, the Supreme Court reasoned that it was appropriate to apply the cause-and-prejudice *[p. 6]* standard to excuse a habeas petitioner's failure to develop a material fact at trial. Id. Under this standard, the petitioner is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts at trial by producing

relevant evidence and actual prejudice resulting from that failure. Id. at 1721.

The petitioner's failure to produce relevant evidence at trial could be otherwise excused by showing that a fundamental miscarriage of justice would result from a failure to hold an evidentiary hearing. Id. The fundamental miscarriage of justice exception applies when a petitioner can establish his actual innocence under the probative evidence. Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992). Petitioner has not alleged that exception here.

The Appellate Court opinion in this case indicates that the Seventh Circuit examined the transcript of the 1975

proceedings. Hope, 906 F.2d at 264. Nonetheless, the Appellate Court concluded that Hope's 1975 conviction did not contravene due process of law. Id. at 263. As the transcript pertains to the effectiveness of Hope's counsel at his trial and sentencing in the district court, the failure of Hope's counsel to present the transcript to the district court was also considered by the Court of Appeals. Id. at 264. The Court of Appeals concluded that the transcript is not materially inconsistent with the conviction. Id. Therefore, no prejudice could have resulted from any failure to present it. *[p. 7]* Since these issues have been directly decided by the Court of Appeals, we will consider the transcript

no further.

With regard to the remaining three pieces of new evidence, Hope's petition can be read to suggest two possible reasons for cause under Keeney: (1) that the evidence is newly discovered; or (2) that these pieces of evidence were not presented because of ineffective assistance provided by Hope's district court counsel.

When a petitioner presents new evidence in support of a request for post-conviction relief under §2255, he must show that he could not have produced the evidence at trial without due diligence. United States v. Hedman, 655 F.2d 813, 815 (7th Cir. 1981). The burden is even greater to the petitioner in that he must also show that if the

evidence had been presented at trial or sentencing, he could have obtained a different result. United States v. Scherer, 673 F.2d 176, 178 (7th Cir. 1982). Hope has made no such showing here with regard to the information contained in his affidavit, the Garippo affidavit, or in the letter from the Illinois Department of Corrections.

The affidavit of Judge Garippo can only be considered cumulative evidence because the judge merely summarizes what he said in the transcript. The transcript was determined to be "not materially inconsistent with the Certified Statement of Conviction," Hope, 906 F.2d at 243, which was considered by the district court. There could therefore have been no prejudice

from any failure to introduce Judge Garippo's affidavit. *[p. 8]*

Hope's self-serving affidavit states nothing that does not appear in the transcript, with the exception of Hope's statement as to what his counsel told him in the state proceedings sixteen years earlier. These assertions stand alone as the only evidence that Hope's counsel misrepresented the terms of the agreement to him. In light of the unlikelihood that a trier of fact would find that Hope's counsel did indeed misrepresent the terms of the agreement based upon Hope's affidavit, no prejudice is shown by counsel's failure to obtain that affidavit.

Hope also offers the ineffective assistance of counsel of attorney in the

district court counsel to support the "cause" requirement of Keeney. The effectiveness of Hope's counsel in the district court forms the basis of Hope's second principal argument.

Ineffective assistance of counsel may provide cause if the petitioner's counsel was indeed ineffective under the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984). United States v. Kovic, 830 F.2d 680, 684 n.9 (7th Cir. 1987) (citing Murray v. Carrier, 447 U.S. 478 (1986)). Under Strickland, there is a strong presumption that counsel's conduct falls within the reasonable standard. Strickland, 466 U.S. at 689. Ineffective assistance of counsel will be found when it is shown (1) that

counsel's performance was deficient; and (2) that the deficient performance caused the defendant prejudice. Id. at 687.

However, the issue of whether Hope's district court counsel provided him with constitutionally sufficient representation was decided squarely on appeal against Hope. Hope, 906 F.2d at 263-64. [p. 9] Since this issue was decided on direct appeal, it will not be reconsidered here. Page, 884 F.2d at 302; Norris, 687 F.2d at 900. Therefore, Hope fails to satisfy the "causel" requirement of Keeney.

The prejudice requirement of Keeney is also unsatisfied by the new facts and evidence presented by Hope. The letter from the Illinois Department of

Corrections is probative only on the issue of whether that department's records are current with respect to this individual. The letter does not state that there were no convictions entered against Hope. It is not persuasive on the issue of whether a conviction was indeed entered. No prejudice resulted from the failure of Hope's counsel to obtain such a letter and introduce it during Hope's federal sentencing.

Hope's third principal argument in this petition is that he was denied effective assistance of appellate counsel in the appeal of his federal firearms conviction. Hope specifically contends that his appellate counsel failed (1) to argue that the 1975 conviction was obtained in violation of

his rights to effective assistance of counsel and in violation of due process; (2) to present all relevant Illinois law in arguing whether the 1975 proceeding actually resulted in a conviction; and (3) to obtain an affidavit from Judge Garippo to use in the federal proceedings.

In order to maintain a claim for ineffective assistance of counsel, the petitioner must show that his counsel's performance was so deficient that the proper functioning of the adversarial process was undermined and the proceeding cannot be relied upon to have produced a just result. Strickland v. Washington, 466 U.S. *[p. 10]* 668, 686 (1984). The Strickland standard has been used as a basis for determining

whether a defendant was denied effective assistance of appellate counsel. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985). When a claim of ineffective assistance of appellate counsel is based upon a failure to raise viable issues, the court must examine whether counsel failed to raise significant and obvious issues on appeal. Id. Counsel need not raise every conceivable argument that is supported by the record. Evitts v. Lucy, 469 U.S. 387, 394 (1985). "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray, 800 F.2d at 646.

Thus, under Strickland and Gray, a failure to raise viable issues would not

establish that appellate counsel's performance was deficient per se. A failure to raise viable issues would establish deficient performance only if the issues not raised were clearly stronger than those presented. Here, Hope attempts to establish ineffective assistance of appellate counsel by showing that appellate counsel failed to argue that the 1975 conviction was obtained in violation of his rights to due process and effective assistance of counsel. These issues are not clearly stronger than those presented by appellate counsel. In fact, the appellate court noted the lack of evidence available to support a claim of ineffective assistance or denial of due process. Hope, 906 F.2d at 263. The

opinion shows that these issues were addressed by the district court during sentencing and found to be without merit. Id. With regard to any failure of appellate counsel to raise these *[p. 11]* issues, Hope can show neither deficiency or prejudice to satisfy the Strickland test.

Hope also contends that appellate counsel failed to present all relevant Illinois law in deciding whether the 1975 proceeding actually resulted in a conviction. In support of this, Hope presented a list of Illinois cases discussing the state legislation used to send Hope to a drug treatment center in 1975. While the cases listed shed light on the history and purpose of the drug treatment program provided by the

Illinois Dangerous Drug Abuse Act, Ill. Rev. Stat. ch. 91 1/2, §120 (1973), they are not inconsistent with the appellate court's finding that the 1975 proceeding did result in a conviction. Again, Hope has not shown deficiency on the part of appellate counsel or any resulting prejudice.

Finally, Hope contends that his appellate counsel's assistance was deficient in that he failed to speak with Judge Garippo and that he failed to obtain an affidavit to present to the appellate court. As noted above, the affidavit from Judge Garippo that is attached to the petition now before us merely reflects Judge Garippo's statements in the transcript of the 1975 proceeding. That transcript was

determined by the appellate court to be "not materially inconsistent" with the Certified Statement of Conviction used as evidence in the district court to determine that the 1975 proceeding resulted in a conviction. Hope, 906 F.2d at 264. The affidavit would not have established anything not already contained in the transcript. *[p. 12]*

CONCLUSION

For the foregoing reasons, Hope's request for post-conviction relief is denied without hearing and his petition is dismissed.

ENTER:

[signature]
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: April 27, 1993

APPENDIX D

App. 36

[Order of U.S. District Court dated August 3, 1993, denying reconsideration of order of April 27, 1993 denying relief under 28 U.S.C. §2255]

ORDER

Before us is Petitioner William Hope's motion to reconsider our order which denied his request for relief under §2255. Hope has already exercised a number of appeals and other post-conviction relief avenues and he now asks this court to reconsider our denied of his §2255. Because we find that Hope does not present any new arguments or evidence to this court, we find that his assertions at this stage are merely the same contentions phrased differently and we deny his motion to reconsider.

Hope has already exercised his post-trial motions after his federal

trial, his Seventh Circuit appeal, his Motion for Reconsideration en banc, a Petition for Writ of Certiorari to the United States Supreme Court, a Motion for Reconsideration of Denial of Certiorari, post-conviction proceedings in state court, a §2255 petition and an appeal to the Appellate Court of Illinois, First Judicial District, Fifth Division which is still pending. Aside from a number of arguments which he already raised in his §2255 petition, he asserts that his appellate counsel could not have been effective because he was also sentencing counsel and therefore he could not have pointed out his own deficiencies to the reviewing court.

Hope has already raised the following questions of assistance of

counsel: whether he received effective assistance of counsel in prior state proceedings; whether he received effective assistance of counsel in his federal firearms trial; and whether he received effective assistance of counsel in his appeal of his federal conviction.

Federal Rule 60(a) or (b) requires relief from a judgment based upon such grounds as clerical mistakes and newly discovered evidence. Rule 9(b) of the Rules Governing §2255 Proceedings provides that "a second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are allege, the judge finds that the failure

of the movant to assert those grounds in a prior motion constitutes an abuse of the procedure governed by these rules." 28 U.S.C. §2255, Rule 9(b) (1988).

We find that Hope raises no new arguments that we have not already addressed. Although this new attack on ineffective assistance of counsel is presented in a novel fashion, it dies not offer us any new evidence or insight into this matter which would change our earlier ruling. We deny the motion to reconsider.

(Signed:) George M. Marovich, Judge